APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 81-2103

WILLIAM M. BOUBEL
Plaintiff-Appellee,
VERSUS
MISSOURI PACIFIC RAILROAD COMPANY
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Texas

---

February 16, 1982

Before BROWN, GOLDBERG and POLITZ, Circuit Judges.

PER CURIAM:

Missouri Pacific Railroad Company appeals an adverse jury verdict in an FELA case. Upon completion of our review of the record and consideration of the briefs and arguments of counsel, evaluating appellant's contentions in light of the reduced measure of proof of negligence required to sustain a verdict for the plaintiff in an FELA case, we conclude that the verdict of the jury must be affirmed. The record contains sufficient evidence, from which reasonable inferences may be drawn, that the railroad was negligent in allowing noxious fumes in the work area or in working the employees in proximity to such fumes. Further, appellant's complaint that the verdict is excessive must also be rejected. We cannot determine from the general award of damages that any improper or unsupported elements were considered.

The judgment appealed is AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS LAREDO DIVISION

Civil Action No. L-79-57

WILLIAM M. BOUBEL,
Plaintiff,

vs.

MISSOURI PACIFIC RAILROAD CO.,
Defendant.

[Filed Feb. 18, 1981]

MEMORANDUM AND ORDER

Presently pending before the Court is the Defendant's Motion for a Judgment Non Obstante Veredicto (n.o.v.) and, alternatively, Motion for a New Trial. *See generally* Fed. R. Civ. P. 50(b); 59. In support of its motions, the Defendant contends that a judgment n.o.v. must be granted as the Plaintiff failed to produce any evidence of future damages. The Defendant further argues that, even if a judgment n.o.v. is inappropriate, a remittitur should be ordered.

As a general rule, a district court cannot grant a judgment n.o.v. unless, considering the evidence with all reasonable inferences and in the light most favorable to the party opposed to the motion, the facts and inferences point so strongly and overwhelmingly in favor of one party that reasonable jurors could not arrive at a contrary verdict. *H. C. Blackwell Co.* v. *Kenworth Truck Co.*, 620 F.2d 104, 106 (5th Cir. 1980). The Fifth Circuit has made it clear, however, that a lesser burden applies to FELA cases. In such cases, a directed verdict, and by definition, a judgment n.o.v., is possible only where there is a *complete absence* of probative facts sup-

porting the non-movant's position. *Allen* v. *Seacoast Products, Inc.*, 623 F.2d 355, 360 (5th Cir. 1980). Indeed, the Plaintiff's burden of proof has been referred to as "featherweight". *Caldwell* v. *Manhattan Tankers Corp.*, 618 F.2d 361, 363 (5th Cir. 1980) (Jones Act case). The Plaintiff presented two witnesses on the issue of damages. Given the stringent nature of the above-delineated test, there was clearly enough evidence on damages to submit the question to the jury as reasonable men could differ as to what, if any, damages were sustained by the Plaintiff. The Court has reviewed the cases cited by the Defendant in support of its motion for a judgment n.o.v. and finds them to be inapposite to the situation presented in this case.

The issue of whether to grant a remittitur is more problematic. A remittitur is basically a procedure whereby if a court finds that a verdict is unreasonably high, it may condition denial of a motion for a new trial on plaintiff's consent to a reduction in the size of the verdict. C. Wright & A. Miller, *Federal Practice and Procedure: Civil* § 2807 (1973). A district court has broad discretion in ordering a remittitur. *Geyer* v. *Vargas Productions, Inc.*, 627 F.2d 732, 735 (5th Cir. 1980). In determining whether to order a remittitur, the Fifth Circuit has adopted the so-called "maximum recovery" test. *Keyes* v. *Lauga*, No. 79-1137, slip op. at 3043, 3050 (5th Cir. Jan. 26, 1981). In applying this rule, a district court must first determine the amount that it thinks a properly functioning jury would have awarded in the case. *Lowe* v. *General Motors Corp.*, 624 F.2d 1373, 1383 (5th Cir. 1980); *Glazier* v. *Glazier*, 278 F. Supp. 476, 482 (E.D. La. 1968) (Ruben J.); *see Gorsalitz* v. *Olin Mathieson Chemical Corp.*, 429 F.2d 1033, 1047 (5th Cir. 1970), *modified*, 456 F.2d 180 (5th Cir.), *cert. denied*, 407 U.S. 921 (1972) (adopting *Glazier* standard). After determining the above-mentioned amount, the "maximum recovery" rule requires the district court to determine the maximum amount of deviation from that

verdict that could be allowed without requiring a new trial. *Lowe* v. *General Motors Corp.*, 624 F.2d at 1383; *Glazier* v. *Glazier*, 278 F. Supp. at 482; *see Gorsalitz* v. *Olin Mathieson Chemical Corp.*, 429 F.2d at 1047. This second requirement has also been phrased another way: whether the verdict was clearly within the universe of possible awards which are supported by the evidence. *Narcisse* v. *Illinois Central Gulf Railroad Co.*, 620 F.2d 544, 548 (5th Cir. 1980); *Bonura* v. *Sea Land Service, Inc.*, 505 F.2d 665, 670 (5th Cir. 1974). In the case at bar, given the testimony as to the Plaintiff's past, present and future physical discomfort, loss of overtime income and loss of side income, this Court cannot conclude as a matter of law that the jury's verdict is outside the universe of possible awards which are supported by the evidence. Accordingly, the Defendant's Motion for a Judgment N.O.V. and a New Trial are hereby DENIED.

DONE at Laredo, Texas, this 18th day of February, 1981.

/s/ George P. Kazen
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
LAREDO DIVISION

Civil Action No. L-79-57

WILLIAM M. BOUBEL

VS.

MISSOURI PACIFIC RAILROAD COMPANY

Filed Jan. 9, 1981

FINAL JUDGMENT

A jury was duly selected in this case on January 5, 1981. Trial commenced on January 8, 1981, after all parties announced ready. Presentation of evidence began and after all evidence was presented, the jury heard closing arguments of the attorneys and the instructions of the Court. On January 9, 1981, the jury in open court announced a unanimous verdict in response to special interrogatories. Based on that verdict, which is now on file, the Court renders the following judgment:

It is ORDERED that the Plaintiff, William M. Boubel, do recover of and from the Defendant, Missouri Pacific Railroad Company, the sum of Fifty-Five Thousand Dollars ($55,000.00). Pursuant to 28 U.S.C. § 1961, this judgment shall bear interest at the rate of nine percent (9%) per annum from date hereof until paid in full. Court costs are taxed to the Defendant.

DONE at Laredo, Texas, this 9th day of January, 1981.

/s/ George P. Kazen
United States District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 19

No. 81-2103

D.C. Docket No. CA-L-79-57

WILLIAM M. BOUBEL,
Plaintiff-Appellee,

versus

MISSOURI PACIFIC RAILROAD COMPANY,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Texas

Before BROWN, GOLDBERG and POLITZ, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the Southern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

IT IS FURTHER ORDERED that defendant-appellant pay to plaintiff-appellee the costs on appeal, to be taxed by the Clerk of this Court.

February 16, 1982

Issued As Mandate:

OP-JDT-9

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 81-2103

WILLIAM M. BOUBEL
Plaintiff-Appellee,
VERSUS
MISSOURI PACIFIC RAILROAD COMPANY
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Texas

---

ON PETITION FOR REHEARING

March 15, 1982

Before BROWN, GOLDBERG and POLITZ, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same hereby is denied.

Entered for the Court:

/s/ Henry A. Politz
United States Circuit Judge

APPENDIX F

§ 51. Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; definition of employees

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury, while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interests or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

Apr. 22, 1908, c. 149, § 1, 35 Stat. 65; Aug. 11, 1939, c. 685, § 1, 53 Stat. 1404.

APPENDIX G

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS LAREDO DIVISION

Civil Action No. L-79-57

WILLIAM M. BOUBEL

VS.

MISSOURI PACIFIC RAILROAD COMPANY

VERDICT OF THE JURY

QUESTION NO. 1

Do you find from a preponderance of the evidence that the Defendant, Missouri Pacific Railroad Company, was negligent on the occasion in question?

Answer "Yes" or "No"—Yes.

If you have answered Question No. 1 "Yes", and only in that event, then you must answer the following question:

QUESTION NO. 2

Do you find from a preponderance of the evidence that the negligence of the Defendant, Missouri Pacific Railroad Company, was a cause in whole or in part, no matter how small, of the injuries suffered by Mr. Boubel?

Answer "Yes" or "No"—Yes.

QUESTION NO. 3

Find from a preponderance of the evidence the amount of money, if any, if paid now in cash, which would farily and adequately compensate William M. Boubel for injuries he sustained, if any, as a result of the negligence, if any, on the part of the Defendant.

You shall consider the following elements of damages, and none other:

(a) Physical pain and mental anguish in the past.

(b) Physical pain and mental anguish, which in reasonable probability, he will suffer in the future.

(c) Loss of earnings in the past.

(d) Loss of earning capacity which, in reasonable probability, he will suffer in the future.

Answer in dollars and cents, if any.

Answer: $55,000.00.

Date: 1/9/81

/s/ [Illegible]
Foreman

APPENDIX H

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS LAREDO DIVISION

No. L-79-57

WILLIAM M. BOUBEL

VS.

MISSOURI PACIFIC RAILROAD COMPANY

[Filed Jan. 17, 1981]

MOTION FOR NEW TRIAL AND PLEA FOR REMITTITUR IN THE ALTERNATIVE TO MOTION FOR JUDGMENT NOTWITHSTANDING VERDICT

Defendant moves the court to set aside the verdict entered in the above entitled action on January 9, 1981, and the judgment entered thereon on the same date, and to enter judgment in favor of the Defendant in accordance with the motion for directed verdict made by the Defendant at the close of all the testimony herein.

In the alternative to the foregoing motion, Defendant moves this Honorable Court to set aside the verdict and the judgment entered thereon and grant it a new trial or order a remittitur of damages awarded.

Such actions are required for any or all of the following reasons:

1. The verdict is contrary to law.

2. There was no evidence or insufficient evidence to support the verdict as to future physical pain or mental anguish of the plaintiff and loss of future earning capacity.

3. The verdict is contrary to the weight of the evidence.

4. The verdict of the jury as to general damages is grossly excessive and unreasonable under the evidence.

5. The verdict in the sum of Fifty Five Thousand Dollars ($55,000.00) is punitive in character and contrary to the Court's rulings and evidence adduced.

6. This Honorable Court erred during the course of the trial in permitting the Plaintiff to speculate as to gross profit he estimated he would have received on a lawnmower repair business, separate and apart from his employment with the Defendant.

7. This Honorable Court erred in its charge to the jury in the following respects:

(a) Question No. 3 permitted and, in fact, instructed the jury to consider physical pain and mental anguish and loss of future earning capacity of the Plaintiff and, further, specified that such would occur in reasonable probability.

(b) There was no evidence introduced as to future physical pain and mental anguish and future loss of earning capacity of the Plaintiff.

(c) There was insufficient evidence to support any findings by the jury that the Plaintiff would have future physical pain and mental anguish and future loss of earning capacity.

(d) Any finding by the jury as to future physical pain and mental anguish and future loss of earning capacity of the Plaintiff was against the great weight and preponderance of evidence.

(1) The only testimony bearing on the Plaintiff's future physical pain and mental anguish was Dr. Jenkin's testimony that the Plaintiff had made a full and complete recovery. There was no evidence of any permanent or residual injury to the Plaintiff.

PRAYER

WHEREFORE, Defendant MISSOURI PACIFIC RAILROAD COMPANY prays that this Court set aside the verdict returned in the above entitled action and judgment thereon and enter a judgment for said Defendant or, in the alternative, order a new trial or remittitur of damages awarded to Plaintiff.

Defendant reserves the right to supplement or amplify the foregoing reasons for a judgment notwithstanding the verdict or new trial, including its request for remittitur following receipt of a transcript of the record.

Respectfully submitted,

GRESHAM, DAVIS, GREGORY,
WORTHY & MOORE

By /s/ Bond Davis
State Bar No. 05462000
1800 Frost Bank Tower
San Antonio, Texas 78205
(512) 226-4157
HORNBERGER AND HORNBERGER

By /s/ J. G. Hornberger, Jr.
State Bar No. 10..3100
915 Victoria St.
Laredo, Texas 78040
Attorneys for Defendant

APPENDIX I

Rule 277. Special Issues

In all jury cases the court may submit said cause upon special issues without request of either party, and, upon request of either party, shall submit the cause upon special issues controlling the disposition of the case that are raised by the written pleadings and the evidence in the case, except that, for good cause subject to review or on agreement of the parties, the court may submit the same on a general charge.

It shall be discretionary with the court whether to submit separate questions with respect to each element of a case or to submit issues broadly. It shall not be objectionable that a question is general or includes a combination of elements or issues. Inferential rebuttal issues shall not be submitted. The placing of the burden of proof may be accomplished by instructions rather than by inclusion in the question.

In submitting the case, the court shall submit such explanatory instructions and definitions as shall be proper to enable the jury to render a verdict and in such instances the charge shall not be subject to the objection that it is a general charge.

The court may submit special issues in a negligence case in a manner that allows a listing of the claimed acts or omissions of any party to an accident, even, or occurrence that are raised by the pleadings and the evidence with appropriate spaces for answers as to each act or omission which is listed. The court may submit a single question, which may be conditioned upon an answer that an act or omission occurred, inquiring whether a party was negligent, with a listing of the several acts or omissions corresponding to those listed in the preceding question and with appropriate spaces for each answer. Conditioned upon an affirmative find-

ing of negligence as to one or more acts or omissions, a further question may inquire whether the corresponding specific acts or omissions (listing them) inquired about in the preceding questions were proximate causes of the accident, event, or occurrence that is the basis of the suit. Similar forms of questions may be used in other cases.

In any case in which issues are raised concerning the negligence of more than one party, the court shall submit and issue inquiring what percentage, if any, of the negligence that caused the occurrence in question is attributable to each of the parties found to have been negligent, and shall instruct the jury to answer the damage issues without any reduction because of negligence, if any, of the person injured.

The court may submit an issue disjunctively where it is apparent from the evidence that one or the other of the conditions or facts inquired about necessarily exists. For example, the court may, in a workmen's compensation case, submit in one question whether the injured employee was permanently or only temporarily disabled.

The court shall not in its charge comment directly on the weight of the evidence or advise the jury of the effect of their answers, but the court's charge shall not be objectionable on the ground that it incidentally constitutes a comment on the weight of the evidence or advises the jury of the effect of their answers where it is properly a part of an explanatory instruction or definition.

(Amended by orders of March 31, 1941, eff. Sept. 1, 1941; May 25, 1973, eff. Sept. 1, 1973.)

Source: R.C.S. Art. 2189.

Rule 279. Submission of Issues

When the court submits a case upon special issues, he shall submit the controlling issues made by the written

pleadings and the evidence, and, except in trespass to try title, statutory partition proceedings and other special proceedings in which the pleadings are specially defined by statutes or procedural rules, a party shall not be entitled to an affirmative submission of any issue in his behalf where such issue is raised only by a general denial and not by an affirmative written pleading on his part. Nothing herein shall change the burden of proof from what it would have been under a general denial. Where the court has fairly submitted the controlling issues raised by such pleading and the evidence, the case shall not be reversed because of the failure to submit other and various phases or different shades of the same issue. Failure to submit an issue shall not be deemed a ground for reversal of the judgment, unless its submission, in substantially correct wording, has been requested in writing and tendered by the party complaining of the judgment; provided, however, that objection to such failure shall suffice in such respect if the issue is one relied upon by the opposing party. Failure to submit a definition or explanatory instruction shall not be deemed a ground for reversal of the judgment unless a substantially correct definition or explanatory instruction has been requested in writing and tendered by the party complaining of the judgment.

Upon appeal all independent grounds of recovery or of defense not conclusively established under the evidence and upon which no issue is given or requested shall be deemed as waived; but where such ground of recovery or of defense consists of more than one issue, if one or more of the issues necessary to sustain such ground of recovery or of defense, and necessarily referable thereto, are submitted to and answered by the jury, and one or more of such issues are omitted, without such request, or objection, and there is evidence to support a finding thereon, the trial court, at the request of either party, may after notice and hearing and at any time before the

judgment is rendered, make and file written findings on such omitted issue or issues in support of the judgment, but if no such written findings are made, such omitted issue or issues shall be deemed as found by the court in such manner as to support the judgment. A claim that the evidence was insufficient to warrant the submission of any issue may be made for the first time after verdict, regardless of whether the submission of such issue was requested by the complaining party.

(Amended by order of March 31, 1941, eff. Sept. 1, 1941.)

Source: Art. 2190.

Rule 434. If Judgment Reversed

When the judgment or decree of the court below shall be reversed, the court shall proceed to render such judgment or decree as the court below should have rendered, except when it is necessary that some matter of fact be ascertained or the damage to be assessed or the matter to be decreed is uncertain, in either of which cases the cause shall be remanded for a new trial.

Provided, first, that no judgment shall be reversed on appeal and a new trial ordered in any cause on the ground that the trial court has committed an error of law in the course of the trial, unless the appellate court shall be of the opinion that the error complained of amounted to such a denial of the rights of the appellant as was reasonably calculated to cause and probably did cause the rendition of an improper judgment in the case, or was such as probably prevented the appellant from making a proper presentation of the case to the appellate court; and if it appear to the court that the error affects a part only of the matter in controversy and that such part is clearly separable without unfairness to the parties, the judgment shall only be reversed and a new trial ordered as to that part affected by such error, provided that a separate trial on unliquidated damages alone shall not be ordered if liability issues are contested.

Provided, second, that if the erroneous action or failure or refusal of the trial judge to act shall prevent the proper presentation of a cause to the Court of Civil Appeals, and be such as may be corrected by the judge of the trial court, then the judgment shall not be reversed for such error, but the appellate court shall direct the said judge to correct the error, and thereafter the Court of Civil Appeals shall proceed as if such erroneous action or failure to act had not occurred.

(Amended by orders of March 31, 1941, eff. Sept. 1, 1941; July 22, 1975, eff. Jan. 1, 1976.)

Source: Art. 1856.